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IN THE

Supreme Court of the United States

October Term, 1963

DALE ROSS,
Petitioner,

vs.

GREAT NORTHERN RAILWAY COMPANY, a corporation,
Respondent.

No. 241

PETITION FOR WRIT OF CERTIORARI

To the United States Court of Appeals for the Ninth Circuit

LEONARD F. JANSEN
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Ritzville, Washington

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To the United States Court of Appeals for the Ninth Circuit

To the Honorable Chief Justice of the United States and the Associate Justices of the Supreme Court of the United States.

Petitioner prays that a writ of certiorari issue to review the judgment of the United States Court of Appeals for the Ninth Circuit, entered in the above-entitled case on March 13, 1963.

OPINIONS BELOW

The district court filed no reported opinion. The opinion of the Court of Appeals (App. B, *infra*, p. 34-46) is reported at F. 2d .

JURISDICTION

The judgment of the court of appeals was entered on March 13, 1963 (App. B, *infra*, p. 47). Timely petition for rehearing was filed April 8, 1963, and rehearing was denied on April 12, 1963. The jurisdiction of this Court is invoked under 28 U. S. C. Sec. 1254 (1).

QUESTIONS PRESENTED

1. Whether the provisions of the 7th amendment were violated in a diversity negligence action where the District Court granted judgment N. O. V. (notwithstanding the verdict) of the jury in favor of the Plaintiff and in granting a judgment of dismissal, all in favor of the Defendant below, the Great Northern Railway Company, and the Court of Appeals affirmed the judgment of the District court, there being no speculation as to the cause of serious head, body, and eye injuries to Petitioner, including partial loss of vision in one eye, caused by a free fall from the top of defendant's piggyback trailer some 18 feet to a concrete floor adjacent to defendant's railroad track. The fall being caused while Petitioner was unfolding a tarpaulin to cover the top of a load of aluminum loaded piggy back trailer, the tarpaulin being furnished by the defendant railroad

company to Petitioner, the tarpaulin containing foreign sharp wires extending through eyelets of the tarpaulin, which hung up the tarpaulin and caused it to resist unfolding by petitioner, the wires suddenly releasing the fold of the tarpaulin so as to cause the petitioner to be catapulted off of the top of the load, quite clear of the load, to the concrete below, the furnishing of such a tarpaulin with the foreign wires hidden in the inner folds in such a manner as to hang up the unfolding of the tarpaulin, constituted an unsafe piece of equipment for the Petitioner's use in covering the load, there being no inspection at any times by the railroad of the tarpaulins to see that they were safe or fit for use, especially by personnel on top of a narrow piggy back trailer some 18 feet from ground level, a jury returning a verdict on special interrogatories that the railroad was negligent and that the Petitioner was not contributorily negligent, the District Court having by its instructions narrowed the issues by informing the jury it could only impose liability on the railroad if they found that wires in the tarpaulin caused the Petitioner's fall. The District Court on July 6, 1962, some two months after the trial, and without any hearing, granted judgment N. O. V. and judgment of dismissal in favor of the railroad, defendant below, on the District Court's finding that petitioner's evidence did not justify the inference that the cause of his injuries were the wire or wires in the eyelets of the tarpaulin, and the District Court's own conclusion that it is a matter of common experience that heavy canvas when compactly folded is more or less stiff and subject to crinkling and catching in unfolding and that petitioner did not

reasonably exclude this and several other equally probable causes of his fall.

2. Whether the District Court and the Court of Appeals in their reviews of the evidence and the jury's findings for Petitioner, and their later actions, have deprived petitioner of his right under the Rules of Decision Act to have his case decided in accordance with the law of Washington by ignoring the decisions of the Washington courts with respect to:

(a) the weight to be afforded circumstantial evidence.

(b) the jury's right and prerogative in Washington to determine all of the issues properly presented to it, including deciding ultimate questions on circumstantial evidence and inferences flowing therefrom respecting proximate cause and negligence of a defendant.

(c) Restrictions on the trial court supplementing the record on a motion for judgment N. O. V. with his knowledge of matters not of common knowledge or experience.

(d) Prohibitions on the trial court's invasion of the jury's function to determine the facts and the reasonable inferences to be drawn from the facts.

CONSTITUTIONAL PROVISION AND STATUTE INVOLVED

The Seventh Amendment to the Constitution of the United States provides:

> "In Suits at common law, where the value in controversy shall exceed twenty dollars, the right of trial by jury shall be preserved, and no fact tried by a jury shall be otherwise reexamined in any Court of the

United States, than according to the rules of the common law.

The Rules of Decision Act (28 U. S. C. sec. 1652) provides:

> "The laws of the several states, except where the Constitution or treaties of the United States or Acts of Congress otherwise require or provide, shall be regarded as rules of decision in civil actions in the courts of the United States, in cases where they apply."

STATEMENT

The Plaintiff, Petitioner herein, brought action against the Great Northern Railway Company, in the United States District Court for the Eastern District, Northern Division, of Washington, to recover damages for serious personal injuries incurred in a fall of some eighteen feet to a concrete loading dock, resulting in the loss of vision in one eye.

Jurisdiction was based on diversity of citizenship and the Employers Liability Act, Title 45 U. S. C. sec. 59 et seq.

The complaint charged the defendant, Great Northern Railway Company, was negligent in failing to furnish a safe tarpaulin to the Plaintiff, for his duties in covering a Piggy Back trailer load of aluminum, which was being prepared for shipment on a Great Northern Railway flat car, at the Great Northern's loading yards, in Spokane, Washington.

This cause of action was based upon common law negligence and upon the theory that the plaintiff at the time

of his injury, was a loaned servant of the defendant, Great Northern Railway Company, and could also prosecute this action for his injuries under the Employer's Liability Act.

On trial to a jury, and at the close of all the evidence, the cause was submitted to the jury. No motion for directed verdict or dismissal was made (R-456). The trial judge declined to make any comment on the evidence (R-460). The jury, by special interrogatories found this defendant, Great Northern Railway Company, guilty of common law negligence which proximately caused the Plaintiff's injuries. Further, that the Plaintiff was not contributorily negligent. The jury also found that at the time of the Plaintiff's injuries he was not an employee (loaned servant) of this defendant. A verdict was returned in favor of Plaintiff for $20,000.00 against the defendant on May 8, 1962.

Subsequently the defendant filed a post-trial motion for judgment N. O. V. and a motion for new trial. The District Court, without holding any hearing, granted judgment N. O. V. on July 6, 1962, and dismissed the action. (App. A, *infra* p. 32-33).

On appeal by the Plaintiff, Dale Ross, the Court of Appeals for the Ninth Circuit affirmed the district court's action (App. B, *infra,* p. 47).

The principal controversy was whether the Plaintiff had presented an adequate case of circumstantial evidence to place liability on the Defendant, there being no direct testimony by witnesses that wires concealed within inner folds of the tarpaulin hung up the last fold of the tar-

paulin, suddenly released, and catapulted Plaintiff from the top of the piggyback. It was impossible for any person to see through the folds of the tarpaulin. Also, the defendant offering no explanation of the hanging up and sudden release of the tarpaulin, whether the plaintiff was required to disprove every possible explanation that could be imagined as to this event, other than the wires being the offending agencies.

EVIDENCE FOR THE PLAINTIFF

As the Circuit Court points out the circumstances leading up to the Plaintiff's fall were generally undisputed. (App. B, *infra*, p. 35).

On March 19, 1959, Kaiser Aluminum had a shipment of aluminum sheets to be moved from its Trentwood plant near Spokane to Seattle and Honolulu. The shipment was to move piggyback via Spokane International Railroad from Trentwood to Spokane, thence to Seattle via Great Northern Railway Company.

The Spokane International Railroad had a contract with Ross Transfer Company for the handling of such trailer on flatcar movements. Under this arrangement, Ross Transfer would deliver a trailer leased to the Great Northern to the shipper for loading of the aluminum, after which Ross Transfer Company would deliver the trailer to rail site and would load the trailer aboard the rail flatcar, secure it to the flatcar, and cover the load with a tarpaulin if required by the shipper.

Pursuant to this arrangement, Plaintiff, Dale Ross, on March 19, 1959, delivered a trailer to Kaiser for loading of aluminum. After supervising the loading of the aluminum, he returned with the loaded trailer to the Great Northern Railway Company tracks near its freight house at Spokane and loaded the trailer upon a flatcar provided by the Great Northern. In the loading of the trailer onto the flatcar, he was assisted by employees of Ross Transfer. He was also assisted by one Ross Transfer employee, his brother, in covering the load with a tarpaulin, which was given to him for his use by the Great Northern Railway. In the process of unfolding the last folds of the tarpaulin on top of the load of aluminum, which was then on the flatcar, he fell and was seriously injured.

Plaintiff had been one of the partners and owners of Ross Transfer Company until January 1959 when it was sold to Riverside Warehouse.

Before he picked up the load of aluminum from Kaiser, Plaintiff picked up a tarpaulin to cover the load at the Great Northern Warehouse, door No. 11 (R-83). Plaintiff was told by a Great Northern employee to pick up a tarp at this door and plaintiff selected one of the two tarps which were in that warehouse. Each tarp appeared to be the same type (R-84), and appeared to be no different from each other. They were folded about 4 feet across, weighed about 200 pounds, were about 1½ feet high, dark green in color, massive, heavy, halfway dirty from use, and in a used condition. The tarp was bulky, made of canvas and had eyelets on it. The tarps cost $180.00 to $200.00 apiece and were waterproofed.

After Plaintiff arrived at the loading dock and had placed the piggyback on the flatcar, he put the original tarp up on top of the load of aluminum. The top of the aluminum load was level, the aluminum being placed on the load in skids. His brother Gerald Ross helped him to unfold the tarpaulin to cover the load (R-89). After they had partially unfolded the tarpaulin, with no difficulty, they discovered the tarp had to be turned. They turned the tarp so that when the tarp was completely unfolded it would extend down over the edges of the load. Plaintiff continued to unfold the tarpaulin and had it almost completely unfolded when it resisted unfolding and hung up. He continued to tug on it to unfold it when suddenly and unexpectedly the resistance inside the fold gave way. The sudden release caused Ross to lose his grip and to be thrown well clear of the load to the yard level. The last thing Plaintiff saw were some sharp wires extending through the eyelets of the last fold (App. C, *infra*, p. 49) (R-102). This fold had been invisible until the releasing of the tarp.

No other tarpaulins used by Ross Transfer employees had ever had wires through the eyelets. This was later found not to be a regular tarp to cover the loads but was a gondola tarp (App. C, *infra*, p. 52) (R-110). These wires had been cut off fairly close to the eyelets leaving sharp pieces about two to three inches long dangling from the eyelets. Then, without removing these useless foreign pieces of wire they were folded into the tarpaulin and stored in the warehouse by the Railroad. When the Plaintiff subsequently selected the tarpaulin for use as aforesaid

he was completely unaware of the existence of the sharp wires, for the reason that they were hidden in the inner folds. Plaintiff did not see the wires until he was in the start of his catapulting fall, which fall was initiated by the sudden release of the sharp wires, after the plaintiff had given a preliminary tug on the material not knowing what was holding up the material from responding to his prior, standard unfolding methods and techniques. In all the years of similar work in unfolding tarpaulins, and as a pioneer in the field of piggy-back operations, the plaintiff had never experienced any difficulty whatsoever in unfolding tarpaulins (App. C, *infra*, p. 51) (R-109).

The following facts were testified to in support of the Plaintiff's case. (Printed portions of the record supporting Plaintiff's case, see appendix C.) There was no foreign matter in the tarpaulin that was not part of the tarp material, except sharp wires through the eyelets. (App. C, *infra*, p. 48-49) (R-101).

These wires were seen for the first time through the eyelets as the tarp released the last fold and the Plaintiff was catapulted on the load. (App. C, *infra*, p. 49) (R-102).

No similar wire had ever been seen before in the tarps (App. C, *infra*, p. 49) (R-102). This wire had been used by the Great Northern around their freight house (App. C, *infra*, p. 49) (R-102, 103).

The Plaintiff had a twenty-five year safety award at the time of his fall (App. C, *infra*, p. 58) (R-284, 285).

As the Plaintiff was unfolding the tarp he ran into trouble. It hung up its folds, it refused to unfold, the plaintiff applied more force. The resistance inside the tarp, suddenly and unexpectedly released the fold and the Plaintiff was thrown off the load (App. C. *infra* p. 54) (R-113). He was thrown off backwards with great force (R-113) (R-400) (R-383).

Other personnel saw the wires through the eyelets after the Plaintiff's fall (App. C, *infra*, p. 59, 60, 61, 62) (R-380, 381) (R-401).

As the Plaintiff was unfolding the tarp he ran into trouble, or it was holding up, and he braced himself to keep the tarp moving and unfolding and something gave way, and Plaintiff was catapulted to the concrete loading dock. He did not touch the side of the car (App. C, *infra*, p. 54), (R-113).

INSTRUCTION AND RULINGS BY THE TRIAL COURT

The trial court properly instructed the jury and narrowed the issues for the jury to consider the negligence of defendant in the furnishing of the tarp used by Plaintiff. The trial court instructed the jury at the outset that the jury should determine whether the defendant was negligent in the particulars alleged by the Plaintiff; namely, with respect of these wires alleged to have been left in the tarpaulin; that this is the only specification of negligence in the case; that nothing else is claimed as having been a particular of negligence; that the sole and only basis

upon which it is asserted that this defendant was negligent was the evidence concerning whether or not there was or was not wires in one or more of the eyelets of the tarpaulin; that the jury must not discuss or consider or speculate or conjecture about anything else than that (R-461, 462).

The court also instructed in this general summing up instruction that the first question, then, is, was this defendant negligent in that particular respect; that, now, the second question is, if this defendant was negligent in that respect, was it a proximate cause of plaintiff's fall from the load on the trailer in question. Now, this means, does the evidence show, can you find from this evidence that if there were wires in the tarpaulin where they were located, what, if anything, did they have to do as far as the evidence discloses with this accident? (R-462).

The standard circumstantial evidence and direct evidence instruction was also given by the trial court (R-488, 489).

Defendant Great Northern Railway Company did not except to any of these instructions (R-494, 495).

The jury returned a verdict for plaintiff in the amount of $20,000.00 (App. A, *infra*, p. 28) (R-497). The defendant had not moved at the close of all of the evidence of the case for a directed verdict (R-456, 457, 459).

Defendant moved for judgment notwithstanding the verdict and for a new trial. Some two months later, without any hearing on the motions, on July 6, 1962 judgment for defendant was entered dismissing the cause.

The trial court's memorandum opinion in justifying this action in taking the case away from the jury on namely two grounds. That it is common experience that heavy canvas when compactly folded is more or less stiff and subject to crinkling and catching in unfolding. Plaintiff's testimony does not reasonably exclude this and several other equally probable causes of his fall.

OPINION OF THE COURT OF APPEALS

On appeal by the Plaintiff of this invasion of the right of the jury to determine the facts, the Court of Appeals made its own independent re-examination of these facts and affirmed the district court's action (App. B, *infra*, p. 47), and on April 12, 1963 entered the order denying plaintiff's petition for re-hearing (App. B, *infra*, p. 47).

The Court in its opinion sustaining the District Court, placed great emphasis on the Plaintiff's admitted haste, his alleged admitted loss of balance (App. B, *infra*, p. 43). This was based upon re-printed testimony in the Court's opinion of the testimony of Mr. Gerkensmeyer, warehouse foreman, and Mr. Wellman, Manager of Ross Transfer (App. B, *infra*, p. 39-40). The court lost sight of the fact that the Gerkensmeyer testimony in this regard was denied by the Plaintiff (App. C, *infra*, p. 63) (R-417), and the Plaintiff had no recollection of talking to Mr. Wellman on the occasion when these alleged statements were made, due to the fact that it was right after the accident and the Plaintiff was in a state of traumatic shock (App. C, *infra*, p. 56-57) (R-115, 116). The belief as to whether these state-

ments were, or were not made was an issue for the jury resolved by it in favor of the Plaintiff. The court had no right to re-weigh this testimony.

The court again misinterpreted the testimony when it said "The difficulty with appellant's factual position on appeal is that he interprets the language: 'A slip—my hand slipped, something gave way' into a sudden release of the wires." (App. B, *infra*, p. 43).

This was a critical part of the Plaintiff's testimony and the court reversed the order of the events thus giving it an entirely different meaning.

The Plaintiff testified, I braced myself to keep the tarp moving and unfolding, and something gave way, I stepped back, I slipped, my hand slipped, I was over the side. I catapulted to the ground. I did not touch the side of the Car (App. C, *infra*, p. 54). (R-113). When the court reversed the order of the events they had it, "a slip—my hand slipped, something gave way."—indicating that his hand slipped first and then something gave way. As the testimony showed, and found by the jury the something gave way first, which they found to be the wire, and then he slipped—his hand slipped due to the sudden release of the force within the folds of the tarpaulin.

The Circuit Court found from its independent determination of the testimony, and re-weighing of the testimony in determining what the facts should be that the District Court acted properly when it re-weighed the evidence and arrived at its result which was contrary to the findings of the Jury.

It found the Trial Court's granting of the defendant's Motion for Judgment N. O. V. and Judgment of Dismissal in favor of the defendant was proper (App. B, *infra*, p. 46).

REASONS FOR GRANTING THE WRIT

The decision of the Court below and the District Court involves questions of law of general importance. In the exercise of the reviewing function and in setting aside the verdict of the Jury the District Court and the Court of Appeals has so far departed from the accepted and usual course of Judicial proceedings as to require the exercise of this Court's supervisory jurisdiction.

I.

THE DECISION OF THE COURT OF APPEALS DEPRIVES PETITIONER OF HIS RIGHT TO JURY TRIAL UNDER THE SEVENTH AMENDMENT.

The Courts below set aside the jury's verdict solely on their own independent re-examination of the evidence. In determining the issues presented by the motion for judgment notwithstanding the verdict, it disregarded entirely that its review function was limited to the question of law:

"Whether there was any substantial evidence to sustain the jury's verdict?"

That fundamental limitation, based on the requirements of the Seventh Amendment, has been hammered home by this Court.

However, so far as the District Court and the Circuit Court was concerned, there is no such rule. In form, it gave no recognition to the rule; it did not marshal the evidence in support of the verdict, and it gave no consideration to what inferences might reasonably be drawn therefrom. Neither did it pass on the question whether the jury might on the basis thereof, reasonably have found negligence on the part of the defendant. Instead it stated its own inferences as on a trial de novo, minimizing the Plaintiff's evidence, and picked out bits and pieces of evidence to justify their invasion of the jury's historic function to determine the facts. The actions of both courts constitute another whittling away, another erosion of the full right of a citizen to a trial by jury. This is another outright abuse of the courts' functions, duties and responsibilities in supervising a jury Trial.

This petition does not, therefore, merely call on this Court again to duplicate the proper function of the Court of Appeals on review in such cases, and make a third re-evaluation of the evidence to sustain the verdict. Since the courts below did not even purport to perform that function the error here is more basic and of great general importance.

Here, in complete derogation of petitioner's constitutional right, it usurped the functions of the jury, made a de novo determination and set at naught the standards laid down by this Court to protect such invasions of the exclusive province of the jury.

It will little avail this Court to lay down rules for the

guidance of the Appellate and District Courts in the performance of their functions if such flagrant violations of those rules go unchecked.

The standard for review established by this Court is clear. In reviewing the trial court's action in dismissing the action, after a complete trial by jury, the appellate court was called upon only to decide a question of law—Whether there was any substantial evidence upon which the verdict for plaintiff could be sustained. In deciding that question, of course, it was required, as was the District Court, to assume as established all facts in support of plaintiff's claim that the evidence reasonably tends to prove and give the plaintiff the benefit of all favorable inferences that might fairly be drawn from such facts and inferences. *Gunning v. Cooley*, 281 U. S. 90, 94; *Lumbra v. United States*, 290 U. S. 551, 553; *Lavender v. Kurn*, 327 U. S. 645, 653; *Carolina Life Insurance Company et al vs. Williams*, 210 F 2d 477, (CA 5), Cert. granted 348 U. S. 802; *Gibson v. Phillips Petroleum Co.*, 232 F 2d 13 (CA 5) Certiorari granted 352 U. S. 874; *Gallick v. Baltimore & Ohio R. R. Company*, 31 U. S. Law Week 482, Feb. 18, 1963. (Certiorari granted); *Tennant vs. Peoria and P. U. Ry. Co.*, 321 U. S. 29, 33. The Washington rule is similar. *Jensen v. Shaw Show Case Co.*, 76 Wash. 419, 421, 136 Pac. 698; *Wilcoxen vs. Seattle*, 32 Wash. 2nd 734, 203 Pac. 2nd 658; *Lambert vs. Smith*, 54 Wash. 2nd 348 at 353, 340 Pac. 2nd 774; *Wharton v. Dept. Labor and Industries*, 61 Wash. decisions 285, 286, No. 7, February 15, 1963.

Once the evidentiary basis for a verdict is apparent, the

District Court's and the Appellate Court's function is exhausted. *Myers v. Reading Co.*, 331 U. S. 477; *Basham v. Pennsylvania Railroad Company*, 31 U. S. Law Week 4354, April 15, 1963. (Judgment of N. Y. Court of Appeals reversed). *Tiller v. Atlantic C. Line*, 318 U. S. 54, 67; *Wilkinson v. McCarthy*, 336 U. S. 53, 61. The jury, exclusively, is charged with the ascertainment of the facts from direct and circumstantial evidence and deductions from the facts. The lower courts below, at each level, acted therefore without authority to substitute themselves for the jury as they did here, to determine contested issues of fact, weigh the evidence and substitute their conclusions for those of the 12 jurors, whose duty it was to find the facts and resolve the conflicts with its collective wisdom and common sense. *Slocum v. N. Y. Life Ins. Co.*, 228 U. S. 364, 386-387; *Baltimore & C. Line v. Redman*, 295 U. S. 656, 657; *Berry v. United States*, 312 U. S. 450, 453. It is not the function of a court to search the record for conflicting circumstantial evidence in order to take the case away from the jury on a theory that the proof gives equal support to inconsistent and uncertain inferences. The focal point of judicial review is the reasonableness of the particular inference or conclusion drawn by the jury. It is the jury, not the court, which is the fact-finding body. It weighs the contradictory evidence and inferences, judges the credibility of witnesses, receives expert instructions, and draws the ultimate conclusion as to the facts. The very essence of its function is to select from among conflicting inferences and conclusions that which it considers most reasonable. *Tennant vs. Peoria and P. U. Ry. Co.*, 321 U. S. 29, 35.

The Court of Appeals and the District Court's decision disregards the limits imposed by the standard. The District Court and the Court of Appeals did not even make formal obedience to the stated rules. The District Court did not even make a token summary of evidence favorable to the Plaintiff. The Circuit Court gave some so-called summary favorable to the Plaintiff, but in so doing destroyed Plaintiff's evidence by finding its own conclusions as to the events in question, and by resolving its own ideas as to what could happen, and in absolutely disregarding the direct testimony of the Plaintiff that the tarp hung up, suddenly released unexpectedly, which caused the Plaintiff's grip to slip and his resulting catapulting fall. This in the face of the naked record in support of defendant's contentions and required proof of other causes, which triggered and caused the fall. The defendant chose not to suggest other possibilities or probabilities as to the cause of the sudden release of the hung up tarp, by inserting evidence in the record of any other explanation of the cause of the fall. At the end of the trial, after the jury's findings and verdict, the District Court and later the Circuit Court, aided the defendant, and made its choice of what the evidence showed, what the inferences were, and what other possibilities explained the fall, and the action of the canvas.

The District Court and the Appellate Courts' opinions disregarded the pertinent evidence in support of the verdict and the lower courts resolved all conflicts, if any against the plaintiff. They determined what they would have found if they had been sitting as the jury in this

suit. The Circuit Court in its summing up of the case after they had determined the facts, injects, that Plaintiff must have been in a hurry, on top of an uneven load, moving fast to tarp the load, acting carelessly or negligently, with no proof of any fact to sustain his claim (App. B, *infra* p. 46). These courts completely disregarded the demonstration by Plaintiff to the Jury of his tarping, and the fall, the plaintiff and his witness's presence and bearing, and testimony. The courts' opinions constantly sing "hurry to get through." Yet the special interrogatory of the jury found Plaintiff was not guilty of contributory negligence. Many people work fast, but are not careless. Courts work fast. Major Cooper, our latest astronaut, had to work probably as fast as anyone could in his mission, especially in his re-entry when the automatic, failure proof re-entry mechanism failed, the courts would have called him careless if he had been in Plaintiff's position. Both of the courts tailor what they want the facts to be and refuse to concede, that from the evidence introduced, the jury's deduction was the reasonable and probable deduction of what probably occurred. If any of the suggested theories of the defendant on appeal caused the Plaintiff's fall, he would have skinned down the side of the load, and in all probability held onto the last fold of the tarpaulin and thus would not have been seriously injured; but plaintiff testified that he was catapulted to the ground, I did not touch the side of the car (App. C, *infra*, p. 54) (R-113). Webster's International Dictionary defines, catapult as follows: ". . . to move with a suddenness or force as if propelled by a catapult." It may be stated at this point

that the defendant never presented any hypothesis or evidence that the tarpaulin which the Plaintiff was unfolding would catch up and suddenly release with a spring-like force from any other cause, except by the wire or wires hanging up the inner folds of the tarpaulin. When the Plaintiff testified that "something gave way" (App. C, *infra*, p. 54) (R-113) he was not referring to any part of his body, but something at that point that was invisible to him within the folds of the tarpaulin. As the force released the wires, the fold straightened out and as his catapulting fall was initiated the last thing the Plaintiff saw was the wire (App. C, *infra*, p. 48-49) (R-102) which now had come into view, but too late for the plaintiff to save himself from being violently ejected from the load. Witness Griffin testified as to the fact that these wires were present in the tarpaulin (App. C, *infra*, p. 59-60-61) (R-380, 381, 382).

In the case of *Frescoln vs. Puget Sound Traction, L&P Co.*, 90 Wash. 59, 155 Pac. 395.

> "Counsel contend that the deceased may have been injured in many ways, they say: "Frescoln may have slipped upon the steps; he may have tripped over his well-loaded shopping bag; he may have become entangled in his long ulster; he may have been overcome by a sudden spell of dizziness; the heel of his shoe may have come off. It is not impossible that he may have lost his footing by reason of carelessly misjudging the steps, or by reason of some other negligent act on his part."

The court goes on to say:

> "Without reviewing the many decisions of this court and other cases cited by counsel in which it has been

> held that a verdict will not be permitted to rest upon speculation and conjecture, and without receding in any way from the rule as therein announced—a reasonable probability, sufficient to put one charged with negligence to proof, may be shown by circumstances."

This rule has been constantly followed by the Supreme Court of Washington. In, *St. Germain vs. Potlatch Lumber Co.* 76 Wash. 102, 135 Pac. 804 the Washington Supreme Court again said

> "There are very few things in human affairs, and especially in litigation involving damages, that can be established to such absolute certainty as to exclude the possibility, or even some probability, that another cause or reason may have been the true cause or reason for such damage, rather than the one alleged by the plaintiff. But such possibility, or even probability, is not to be allowed to defeat the right of recovery, where the Plaintiff has presented to the jury sufficient facts and circumstances surrounding the occurrence as to justify a reasonable juror in concluding that the thing charged was the prime and moving cause."

Plaintiff's case met the requirements of the State of Washington as is set out in these two cases. He is entitled to have his verdict stand.

The lower courts' disregard of the proof favorable to Plaintiff and they consider only Defendant's position. The summing up of evidence is a recapitulation of contradicted evidence and imagination of defense counsel and the District Court, in favor of Defendant and not of the verdict.

The Courts below failed even to take account of much of the most vital evidence for the Plaintiff, much less view

it in the light most favorable to Plaintiff, the decision of the court below requires review by this court.

This court has from the beginning recognized its duty most zealously to guard the right of trial by jury as a basic and fundamental feature of Federal jurisprudence and that even a seeming curtailment of the right must be scrutinized with the utmost care. *Baylis v. Travelers Ins. Co.*, 113 U.S. 316, 321; *Jacobs v. New York City*, 315 U. S. 752; *Bailey v. Central Vermont Ry. Co.*, 319 U. S. 350, 354; *Wilkinson v. McCarthy*, 336 U. S. 53, 71 (Concurring opinion). It held in the Tennant case supra, pp. 35-36, there is no reason why this court should abdicate its "duty to protect and guard that right."

II.

THE LOWER COURTS HAVE DECIDED QUESTIONS OF LOCAL LAW IN CONFLICT WITH PERTINENT WASHINGTON DECISIONS AND WITHOUT REFERENCE TO THEM AND HAVE SO FAR DEPARTED FROM THE SETTLED COURSE OF JUDICIAL PROCEEDINGS AS TO REQUIRE CORRECTION BY THIS COURT.

Insisting on full observance of the rule of *Erie R. Co. v. Tompkins*, 304 U. S. 64, this court in *West v. American T. & T. Co.*, 311 U. S. 223, said (at p. 236):

> "State law is to be applied in the Federal as well as the state court and it is the duty of the former in every case to ascertain from all the available data what the state law is and apply it rather than to

> prescribe a different rule, however superior it may appear from the viewpoint of 'general law' and however much the state rule may have departed from prior decisions of the Federal courts, * * *"

In *Angel v. Bullington,* 330 U. S. 183, 191 this Court pointed out that enforcement of state policy was the essence of diversity jurisdiction. Applying that rule the lower courts generally have recognized as available data the considered dicta of state courts *Mattson v. Central Electric and Gas Co.,* 174 F. 2d 215, 221-222, (CA 8, 1949); the rationale of the state cases *Jackman v. Equitable Life Assur. Soc. of United States,* 145 F. 2d 945, 947 (CA 3, 1944). Any persuasive data that is available such as compelling inferences or logical implications from other related adjudications of other cases and any convincing manifestation of local law having a clear root in judicial conscience and responsibility should be given heed *Yoder v. Nu-Enamel Corp.,* 117 F 2d 488, 489 (CA 8, 1941).

Assayed by these principles, the absence in the opinion of the courts below of any citation of Washington authorities as a basis for upholding the jury's verdict would create the impression that no Washington decisions have any pertinence. However, the state of Washington is not a judicial vacuum on the issues presented and the proper rule to apply verdicts based in part on circumstantial evidence. The rule is not absolute certainty to justify a verdict based in part on circumstantial evidence and inferences flowing from it. The rule does not require that prior to trial a plaintiff must 'crystal ball' every possible theory that might be thought of at each branch of the

trial, from the District on up the Appellate tree, and that a plaintiff must shoot down each such possible theory or imagination of the District and Appellate Court, in order to hold fast to his verdict, returned after proper consideration, by twelve reasonable people. Especially when they do so under proper instructions of the court and not excepted to by the defendant.

The lower courts failed to properly consider similar cases founded on circumstantial evidence (and also bitterly attacked by the defendant) which is the rule today in the state of Washington. *Frescoln vs. Puget Sound Traction, L & P Co.*, 90 Wash. 59, 155 Pac. 395; *St. Germain vs. Potlatch Lumber Co.*, 76 Wash. 102; 135 Pac. 804; *DeYoung vs. Campbell*, 51 Wash. 2d 11, 315 Pac. 2d 629; *E. K. Wood Lumber Co. vs. Anderson*, 81 Fed. 2d 161 (CA 9).

In failing to take into account the Washington decisions on closely related issues the decision of the courts below ignores the Rules of Decision Act and the principles established by this Court to safeguard its observance. As the language used by both of the lower courts show, in taking away the verdict these two courts, separately emphasize their failure to recognize that the lower court's function was only to determine what it was reasonable for the jury *to presume in favor of the plaintiff*. (Emphasis supplied.)

The lower courts' invasion and abrogation of the jury's right to determine the ultimate issues of this case constitute as serious an erosion of the right to trial by jury as has been observed during the past years in Employer's Liability

Cases. In case after case, the jury was absolutely eliminated as having no useful purpose to perform, as District, Appellate and State courts had determined, sitting as the powerful thirteenth juror, what was, to them, reasonable.

III.

THE GENERAL IMPORTANCE OF THE QUESTIONS HERE INVOLVED MAKES IMPERATIVE THE EXERCISE OF THE CERTIORARI JURISDICTION

In the exercise of its discretionary jurisdiction, this court has long emphasied the continuing importance of its vigilance to preserve in the jury the exclusive power to weigh the evidence and determine contested issues of fact. *Gibson v. Phillips Petroleum Co.* 232 F. 2d 13, Cert. granted. 352 U. S. 874; *Williams vs. Carolina Life Insurance Co.*, 210 F. 2d 477, Cert. granted, 348 U. S. 802; *Basham v. Pennsylvania Railroad Co.*, 31 United States Law Week 4354, April 15, 1963; *Sentilles v. Inter-Caribbean Shipping Corp.* 381 U. S. 107, 110; *Lavender v. Kurn*, 327 U. S. 645-654.

In the administration of justice, the benefits of the jury's composite knowledge of everyday affairs are indispensable. Here, however, it is submitted that the lower courts' failure even to note, much less observe the constitutional limitation on the lower courts' review functions, requires the exercise of this Court's supervisory power.

Additional reason for certiorari here is presented by basic principles of orderly judicial procedure. The steady,

day to day whittling away of the jury function should be halted, before this right is completely extinguished.

CONCLUSION

For the foregoing reasons, this petition for a writ of certiorari should be granted.

Respectfully submitted,

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APPENDIX A

UNITED STATES DISTRICT COURT
EASTERN DISTRICT OF WASHINGTON
NORTHERN DIVISION

FILED IN THE U. S. DISTRICT COURT
Eastern District of Washington
MAY 21, 1962
DOROTHY E. MOULTON, Clerk Deputy

DALE ROSS, *Plaintiff,*
vs.
THE GREAT NORTHERN RAILWAY CO., et al., *Defendants.*

Civil No. 1920

AMENDED JUDGMENT ON JURY VERDICT

This action came on for trial before the Court and a jury, Honorable George H. Boldt presiding, with all parties appearing by counsel and the issues having been duly tried, and the jury, on the 7th day of May, 1962, having rendered a verdict for the plaintiff to recover of the defendant Great Northern Railway damages in the amount of $20,000.00,

IT IS ORDERED AND ADJUDGED that the plaintiff recover of the defendant Great Northern Railway the sum of $20,000.00 and his costs of action, that the action be dismissed as to defendant Spokane International Railroad, and that the defendant Spokane International Railroad recover of the plaintiff its costs of action.

DATED this 21st day of May, 1962.

DOROTHY E. MOULTON, Clerk
By: /s/ *Sandy Sandule*, Deputy

UNITED STATES DISTRICT COURT
EASTERN DISTRICT OF WASHINGTON
NORTHERN DIVISION

DALE ROSS, *Plaintiff,* vs. GREAT NORTHERN RAILWAY COMPANY, a corporation, and SPOKANE INTERNATIONAL RAILROAD COMPANY a corporation, *Defendants.*	Civil No. 1920

MEMORANDUM DECISION

Counsel agree the jury finding that plaintiff was not a railroad employee at the time of his injury leaves plaintiff's claim based solely on Washington common law principles.

The ultimate question presented on the motion of defendant Great Northern Railway for judgment n.o.v. is whether there is evidence in the record reasonably warranting inferences establishing negligence of the moving defendant and proximate causal relationship thereof to plaintiff's injury. As to both propositions plaintiff has the burden of proof. Substantial evidence is required and a "scintilla" is not sufficient under Washington law. *Carley v. Allen,* (1948) 31 Wn. 2d 730; *Wilson v. Northern Pacific Railway Co.* (1954) 44 Wn. 2d 122; *Evans v. Yakima Valley Transportation Co.* (1952) 39 Wn. 2d 841.

The only direct evidence in the record purporting to establish the proximate cause of the accident is the following entire testimony of plaintiff on that subject:

> "A. We were in the process. I stepped across the load to the south side at that time.
>
> Q. And then what happened at that time?

A. I reached down, we were pulling and stretching or moving the tarp out, and I was over the side." Tr. page 49 lines 21-25.

"Q. Going back to my question, would you describe from your recollection how that tarp felt up to the time you fell off this load?

A. Well, we were having a little trouble moving it, not too much, and as I was unfolding it and turning it, it seemed to give way and I went over the side." Tr. p. 50 lines 12-17.

THE COURT: Let me put it this way, just tell us again, Mr. Ross, what you did at the time and what happened to you.

A. Well, as I was moving the tarp and unfolding it, I ran into trouble, or it was holding up, and I braced myself to keep the tarp moving and unfolding, and something gave way. And I stepped back. I slipped, my hand slipped. I was over the side. I catapulted to the ground. I did not touch the side of the car." Tr. p. 54 lines 4-12.

This testimony does not meet the requirements stated by the Washington State Supreme Court in *Wilson v. Northern Pacific Railway Co.*, 44 Wn. 2d 1922 (1954) or rise to the quality and substance of the evidence before the same court in *DeYoung v. Campbell*, 51 Wn. 2d 11 (1957), the cited decision most favorable to plaintiff.

Mr. Ross's testimony does not show directly or justify the inference that in his handling of the tarpaulin "the something" that "gave way" was a wire or wires in the eyelets of the tarpaulin or some condition in the tarpaulin caused thereby. It is a matter of common experience that heavy canvas when compactly folded is more or less stiff and subject to crinkling and catching in unfolding. Plaintiff's testimony does not reasonably exclude this and several other equally probable causes of his fall.

The difference between speculation and a reasonable inference constituting substantial evidence often cannot be

specified with precision apart from a finding of one or the other in a particular fact pattern. The firm conclusion that the general verdict for plaintiff must have been based only on speculation and conjecture rather than on reasonable inferences inescapably follows from analysis of the controlling Washington decisions and close consideration of the evidence.

Accordingly, the motion of defendant Great Northern Ry. for judgment dismissing the action notwithstanding the general verdict must be and hereby is granted. Plaintiff's exception noted. Appropriate form of judgment may be presented for signature at the convenience of counsel.

Dated this 18th day of June, 1962.

GEO. H. BOLDT,
United States District Judge

IN THE DISTRICT COURT OF THE UNITED STATES
FOR THE EASTERN DISTRICT OF WASHINGTON
NORTHERN DIVISION

DALE ROSS,
Plaintiff,

vs.

GREAT NORTHERN RAILWAY COMPANY, a corporation, and SPOKANE INTERNATIONAL RAILROAD COMPANY a corporation,
Defendants.

GREAT NORTHERN RAILWAY COMPANY, a corporation,
Third Party Plaintiff,

vs.

SPOKANE INTERNATIONAL RAILROAD COMPANY, a corporation,
Third Party Defendant.

SPOKANE INTERNATIONAL RAILROAD COMPANY, a corporation,
Third Party Plaintiff,

vs.

ROSS TRANSFER COMPANY, a corporation,
Third Party Defendant.

Civil No. 1920

JUDGMENT OF DISMISSAL

This cause having come on for trial on May 2, 1962 before the undersigned Judge of the above entitled Court; witnesses having been sworn and evidence presented on behalf of plaintiff and defendants; the jury having rendered its verdict in favor of plaintiff and against defendant, Great Northern Railway Company, and judgment having

been entered on that verdict; and defendant, Great Northern Railway Company, having moved to set aside the verdict and judgment on the verdict and enter judgment of dismissal in favor of Great Northern Railway Company, or in the alternative, for a new jury trial; both parties having submitted briefs in accordance with their respective positions, and the Court having reviewed and examined the briefs and evidence and files herein, and being duly advised in the premises; and the Court having heretofore rendered and entered its memorandum decision dated June 18, 1962 which grants the motion of defendant, Great Northern Railway Company, for judgment dismissing the action notwithstanding the general verdict, and directs entry of judgment of dismissal in favor of the defendant, Great Northern Railway Company; NOW, THEREFORE:

IT IS HEREBY ORDERED, ADJUDGED AND DECREED, that the plaintiff take nothing by his action, and that the verdict of the jury and the judgment thereon against defendant, Great Northern Railway Company, heretofore entered, be vacated and that the above entitled case and the same is hereby dismissed with prejudice and with costs to the defendant, Great Northern Railway Company, to be taxed according to law.

DATED this 6th day of July, 1962.

GEO. H. BOLDT,
United States District Judge

Presented by:

THOMAS J. WETZEL
Of Attorneys for Defendant,
Great Northern Railway Company

APPENDIX B

UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

DALE ROSS,
Appellant,
vs.
GREAT NORTHERN RAILWAY COMPANY, a corporation,
Appellee.

No. 18,278
March 13, 1963

Appeal from the United States District Court for the Eastern District of Washington, Northern Division

Before: CHAMBERS, ORR and BARNES, Circuit Judges

BARNES, Circuit Judge:

Appellant sued appellee in two causes of action for serious personal injuries. The first cause of action was based on the Federal Employer's Liability Act (45 U.S.C. §§ 5 and 51, *et seq.*), herein sometimes referred to as "F.E.L.A." The second cause of action was a common law action for negligence. Both were submitted to a jury, which found, in answers to special interrogatories: That Great Northern Railway was negligent; that such negligence was a proximate cause of appellant's fall and injuries; that Spokane International Railroad was not negligent; that appellant himself was not negligent; that the appellant was not an employee of either defendant; that appellant sustained damages in the sum of $20,000.

The F.E.L.A. thus being out of the case, the trial judge (as he had strongly indicated he would do when he submitted the issue of employment to the jury)[1] granted a

[1] "If this was unquestionably a common law negligence case, I would not have the slightest hesitancy in dismissing the case for want of proof of either negligence or proximate cause." (Tr. 423)

judgment notwithstanding the verdict to the defendant Great Northern Railway Company.

The sole question on appeal is whether the jury verdict was properly set aside and whether the judgment notwithstanding the verdict was properly entered. This was a diversity case (28 U.S.C. § 1332), if not an F.E.L.A. case (28 U. S. C. § 1331). Jurisdiction exists here under 28 U.S.C. § 1291.

The circumstances leading up to the accident itself were generally undisputed. They were these:

On March 19, 1959, Kaiser Aluminum had a shipment of aluminum sheets to be moved from its Trentwood plant near Spokane to Seattle and Honolulu. Spokane International Railroad, as the only railway company serving Kaiser's Trentwood plant, was the originating carrier. The shipment was to move piggyback via Spokane International Railroad from Trentwood to Spokane, thence Great Northern Railway Company to Seattle.

The Spokane International Railroad had a contract with Ross Transfer Company for the handling of such trailer on flatcar movements. Under this arrangement, Ross Transfer would deliver a trailer to the shipper for loading of the aluminum, after which Ross Transfer Company would deliver the trailer to rail site and would load the trailer aboard the rail flatcar, secure it to the flatcar, and cover the load with a tarpaulin if required by the shipper.

Pursuant to this arrangement, plaintiff, Dale Ross, on March 19, 1959, delivered a trailer to Kaiser for loading of aluminum. After supervising the loading of the aluminum, he returned with the loaded trailer to the Great Northern Railway Company tracks near its freight house at Spokane and proceeded to load the trailer upon a flatcar provided by the Great Northern. In the loading of the trailer onto the flatcar, he was assisted by employees of Ross Transfer. He was also assisted by them in securing the trailer to the flatcar and covering the load with a tarpaulin which he had procured from the Great Northern freight house. In the process of turning or unfolding the tarpaulin on top of the

load of aluminum on the trailer, which was then on the flatcar, he fell and was injured.

Plaintiff had been one of the partners and owners of Ross Transfer Company until January 1959, when the partnership, which had been incorporated, was sold to Riverside Warehouse. Before he picked up the load of aluminum from Kaiser, plaintiff picked up a tarp to cover the load at the Great Northern warehouse in Spokane. Plaintiff was told by a Great Northern employee where the tarps were located and plaintiff selected his own tarp from the warehouse. We have assumed for the purpose of this opinion that it was a tarp owned by the Great Northern Railway Company, although the tarps in the warehouse from which plaintiff selected the one involved here were owned by various trucking companies, as well as Great Northern Railway Company. When these tarps were returned to Spokane by railroad, they were consigned to Great Northern Agent McFarland and placed at door 11 of the Great Northern freight house, regardless of ownership. According to plaintiff, the tarpaulin which he selected was no different than the others at the freight house. It weighed close to 200 pounds and folded was about 4 feet across, about 1½ feet high, dark green in color, massive, heavy, halfway dirty, and in a used condition. The tarp was bulky, made of canvas and had eyelets on it, much the same as Exhibits Nos. 31 and 32. They (the tarps) were also expensive, costing between $180.00 and $200.00 apiece and, of course, were waterproof, inasmuch as their purpose was to protect the shipment from damage by rain and the elements.

When plaintiff Ross arrived at the Great Northern piggyback loading ramp with the load of aluminum, he then backed the trailer load of aluminum onto the railroad flatcar and put the original tarp he had selected earlier in the day up on top of the load of aluminum. Plaintiff's brother, Gerald Ross, was helping him with the tarpaulin on top of the load of aluminum. Plaintiff Ross was an expert in the piggyback business and did not need anyone to tell him how to do the details of his job. After plaintiff

Ross and his brother Gerald had started to unroll the tarp on top of the load of aluminum, plaintiff had to get down for a moment to get the bill of lading out of the cab of the truck. While plaintiff was away from the tarp for a moment, his brother found that the tarp was placed on the load the wrong way and would have to be turned. When plaintiff got back on the load, his brother told him of the problem and they started to turn the tarp. According to Gerald Ross, his brother grabbed hold of the tarp to help turn it and pulled on the tarp and fell backwards.

Getting to the details of appellant's fall, it was appellant's theory of negligence that there were wires passing through the "eyelets" of the tarp, left on when wires had been used previously to secure the tarp to flat cars, later to be cut (as were the ropes sometimes alternately used) when the tarp was removed as a cover for the aluminum shipped.[2] These wires, with their sharp points, could easily, say appellant's counsel, have caught in the tarp and when force was used by appellant to unfold the tarp, could have "unexpectedly" given way, "plunging"[3] or "catapulting"[4] the appellant to the concrete floorway of the loading dock.

There exists a considerable difference of opinion between counsel, both as shown by their briefs and expressed at the time of oral argument, as to just how the accident occurred; what force appellant exercised and against what object; where he was standing; whether the tarp was *folded* "wrong", or was *placed* "wrong" on the load, etc.

For that reason we have carefully searched the record, and rely only on what was testified to by the various witnesses:

(1) Appellant testified the tarp "was not folded correctly" (Tr. 97, l. 3); "it was folded wrong" (Tr. 97, l. 6); the tarp was placed "crosswise of the car" (Tr. 98, l. 13); and not completely unfolded (Tr. 98, ll. 18-19).

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[2]Appellant noticed two wires, in two eyelets, four to six inches in length.

[3]The word used in the plaintiff's contentions in the pretrial order.

[4]The word used in oral argument, and by appellant (Tr. 113).

"If it was folded right, you could set it on top of the load, in the center of the load, and roll it from both ends out . . . and it will automatically fall down over the load" (Tr. 99, ll. 14-18); but is "not [then] completely unfolded" (Tr. 100, l. 18). "[A]fter you get it elongated out lengthwise," you "put it on over the sides of the load" (Tr. 100, l. 25, 101, l. 1).

After the tarp was found "in the wrong direction, folded wrong . . . we had to put it longways . . . we left it partially unfolded and proceeded to turn it partially unfolded (Tr. 101) . . . We had to turn it so it would fold longways over the load. (Tr. 101) After we had turned it ways, we started to unfold it some more" (Tr. 102) and saw wire "two pieces . . . four to six inches long," through the eyelets (Tr. 103). "We were in the process [of turning the tarp]. I stepped across the load to the south side at that time."

"Q. And then what happened at that time?

"A. I reached down, we were pulling and stretching or moving the tarp out, and I was over the side . . . [Tr. 108] * * * I was off about the center [of the load]. . . . [W]e were having a little trouble moving it, not too much, and as I was unfolding it and turning it, it seemed to give way and I went over the side. [Tr. 109] * * *

"Q. Tell us how you happened to lose your grip on the tarp and fall off the load.

"The Court: Let me put it this way, just tell us again, Mr. Ross, what you did at the time and what happened to you.

"A. Well, as I was moving the tarp and unfolding it, I ran into trouble, or it was holding up, and I braced myself to keep the tarp moving and unfolding and something gave way. And I stepped back, I slipped, my hand slipped. I was over the side. I catapulted to the ground. I did not touch the side of the car." (Tr. 113.)

He had been standing sideways, not endwise to the

load, facing north, with his back in the direction he fell. (Tr. 207-8.)

(2) On cross-examination, Dale Ross, who was an expert on the piggyback business of putting truck trailers on railway cars (Tr. 178-9; 196), testified he could have put the tarp on at the Kaiser plant when he picked up the load of aluminum or at the loading dock of the Great Northern spur before the trailer went on the flatcar, but "my time was behind" (p. 162), and this was not done, in order "to speed up the operation."

"Q. . . . [I]t was because you were in a hurry?

"A. Yes. [Tr. 163]

"Q. . . . [I]t would have been safer to have taken the tarp down onto the ground and unfolded it and refolded it if it needed refolding? [Tr. 164]

"A. . . . if we had time."

Ross had a six o'clock deadline to meet. (Tr. 200.) His watch, broken in the accident, stopped at thirteen minutes to six. (Tr. 199.)

(3) Mr. Gerkensmeyer, warehouse foreman for the Great Northern Railway Company, testified he had visited Mr. Ross at his house a week or more after the accident.

"Q. Did you inquire about the accident?

"A. Yeah—well, I asked Mr. Ross what happened, and he told me.

"Q. What did he tell you?

"A. He said, 'Just one of those things, Dick,' he said. 'Just lost my balance.'

"Q. Did he make any mention of anything wrong with the tarp?

"A. No." (Tr. 228-9.)

(4) On the evening of the accident, Emery Wellman, Manager of Ross Transfer Company and plaintiff's supervisor, went to the hospital and talked to Mr. Ross. Testimony regarding this conversation between Mr. Wellman

and plaintiff Ross at the hospital was as follows (Tr. 320-1):

"Q. All right. Now, referring to the accident itself, you have just stated that you saw Mr. Ross on the night of the accident, is that true?

"A. Yes.

"Q. And as a matter of fact, did you talk to him?

"A. Yes, I did.

"Q. And during that discussion didn't he state that he was careless?

"A. As I recall the conversation, he made the comment that he was in a hurry, and that he guessed he was a little careless.

"Q. And that is the language he himself used?

"A. I believe so."

(5) Mr. Thomas Griffin, an employee of Ross Transfer Company, assisting plaintiff Ross and Gerald Ross in the loading at the time of the accident, testified as follows (Tr. 385-6):

"Q. As a matter of fact, at the time or shortly thereafter, it was your impression that he slipped or tripped on the skids of aluminum, isn't that correct?

"Mr. Kimer: I object. That wasn't covered in the direct examination. I don't recall him testifying to anything about that.

"The Court: Well, I think you inquired about the nature of his fall and this would be in that general area. If he has any knowledge on this. I think he should be interrogated about it. Put him a question, please.

"Mr. Wetzel: Will you read the question?

"(Whereupon, the previous question was read as follows:

'Q. As a matter of fact, at the time or shortly thereafter, it was your impression that he slipped or tripped on the skids of aluminum, isn't that correct?')

"A. That would be the natural impression I would have, yes.

"Q. (Mr. Wetzel) Is that the impression you had at that time?

"A. That is right, at that time."

The same Mr. Griffin testified as follows at Tr. 386-7:

"Q. (By Mr. Hamblen) Mr. Griffin, you said this was an adequate tarp. I think that is the word you used, right?

"A. Yes.

"Q. Speak up.

"A. Yes, that is right."

(6) Plaintiff's brother, Gerald Ross, who was within a few feet of plaintiff when the accident happened, describes the accident as follows (Tr. 399-400):

"A. Well, Dale got down off the load and I was working with the tarp and I unfolded it out.

"Q. How far more did you unfold it?

"A. I don't know, I folded it out far enough to see what we had—it was the wrong way that we had it. We would have to turn it.

"Q. Then did he get back up on there?

"A. Yes, he got back up on top of the load.

"Q. What did he do?

"A. He crossed over the load and he got—he was facing north, standing, and he grabbed ahold of the tarp and I told him when he got up on the load that we would have to turn it.

"Q. What happened?

"A. He either saw or I told him.

"Q. Then what happened?

"A. He grabbed ahold of the tarp and he pulled on the tarp, and he fell backwards.

"Q. What happened in relation to whether or not his body—what happened to him, as he went backwards, you say, what happened to his body?

"A. He went—seemed to go straight back when I saw him going. I knew he was going to be hurt pretty bad, he was off balance. he was going backwards."

In further testimony about the actual accident, plaintiff's brother Gerald testified as follows (Tr. 405):

"Q. Now, with regard to the accident, isn't it your statement that Dale slipped or tripped and then lost his hold on the tarp, and then fell over the south side of the load?

"A. Yes.

"Q. Was the flatcar standing still at the time?

"A. Yes.

"Q. There were no switch engines or switch crew in the vicinity?

"A. Not right at that moment, no.

"Q. Now, it was also your statement that Dale could have tripped on the edge of the crates or slipped on one of the steel bands, is that not true?

"A. Yes.

"Q. Now, you had an uneven footing on top of the load, did you not?

"A. Yes, that is right."

The jury found the plaintiff Ross was not an employee of either railroad. The Federal Employer's Liability Act is therefore not in the case. The trial judge, out of an abundance of caution, permitted the jury to determine if there was any inference of employment by either railroad, so as to bring the Federal Employer's Liability Act into play. (Tr. 423.) When that aspect of the case was eliminated by the special findings of the jury, the case became one purely of common law negligence. The federal statutes, and cases decided in interpreting them, have no place, then or now, in our consideration of the issues now remaining in the case.

Counsel for appellant urges that the railroad failed to present any evidence to explain the fall—that the railroad "failed to bring forward any theory to explain the hanging up and instantaneous release of the tarpaulin." (Brief, p. 38); that "the presence of the only items that could cause the tarp to hang up and then suddenly release, were found by the jury to be the wires through the eyelets of the tarp." (Brief, p. 45). The jury's interrogatories did not explicitly cover or refer to the wires, nor what caused the fall, nor were any such interrogatories requested or proposed.

The difficulty with appellant's factual position on appeal is that he interprets the language: "a slip—my hand slipped,—something gave way" into a "sudden release *of the wires*—the only items that could cause the tarp to suddenly release." The story told by appellant best suited to his counsel's theory of the case does not support the language used on his behalf in his briefs. It assumes the slip of appellant's hand, the bracing pull appellant made; his moving from the center of the load to the south side, facing north, and his uneven footing all *could not* have caused or proximately contributed to the occurrence of the accident. This without reference to appellant's deadline, his admitted haste, his alleged admitted loss of balance.

As the trial court carefully pointed out:

> "Mr. Ross's testimony does not show directly or justify the inference that in his handling of the tarpaulin 'the something' that 'gave way' was a wire or wires in the eyelets of the tarpaulin or some condition in the tarpaulin caused thereby. It is a matter of common experience that heavy canvas when compactly folded is more or less stiff and subject to crinkling and catching in folding. Plaintiff's testimony does not reasonably exclude this and several other equally probable causes of his fall."

Counsel for appellant urgently suggests that the second sentence quoted above constitutes the taking by the trial judge of judicial knowledge of a fact that is not true, and obviously not in evidence; that all heavy canvas may be

stiff and subject to catching in unfolding. Without passing on this issue, we do not find it interferes with the validity of the court's conclusion in his third sentence, that appellant's testimony, considered fairly, and honestly, does not reasonably exclude several equally probable causes of his fall, other than the one he urges; the two or three four or six inch wires through the eyelets.

Substantial evidence of appellee's negligence and the proximate causal relationship between it and appellant's injuries are required under Washington law. Substantial evidence is required, and a "scintilla" of evidence is unsufficient under that law. *Wilson v. North Pac. Ry. Co.*, 1954, 44 Wash. 2d 122, 265 P. 2d 815; *Evans v. Yakima Valley Transp. Co.*, 1952, 39 Wash. 2d 841, 239 P. 2d 336; *Carley v. Allen*, 1948, 31 Wash. 2d 730, 198 P. 2d 827.

In *Wilson v. North. Pac. Ry. Co., supra,* involving a crossing accident and common law negligence, the Washington Supreme Court said:

> "We have held that negligence may be proven by circumstantial evidence. We have also held that proof of negligence does not have to be beyond a reasonable doubt. But this court has never held . . . that the proof of the proximate cause could be left to conjecture or speculation."

The trial court's refusal to grant a motion notwithstanding the jury's verdict was reversed.

In *Carley v. Allen, supra,* the Washington Supreme Court said:

> "Negligence will not be presumed. . . .
>
> The party alleging negligence must prove that negligence existed . . . . and, further, that the negligence was the proximate cause of the injury." (Citing Washington cases in support of each proposition.) (P. 831.)

And further, that:

> "Another rule of the same tenor is:
>
> "* * * if there is nothing more tangible to proceed upon than two or more conjectural theories under one

or more of which a defendant would be liable and under one or more of which a plaintiff would not be entitled to recover, a jury will not be permitted to conjecture how the accident occurred.' *Gardner v. Seymour*, 27 Wash. 2d 802, 180 P. 2d 564, 569.

Another statement of the law is:

'In showing that the negligence charged was the proximate cause of the injury, it is not enough for the plaintiff to prove that the negligence might perhaps have caused the injury. If, for example, the injury complained of might well have resulted from any one of many causes, it is incumbent upon the plaintiff to produce evidence which will exclude the operation of those causes for which defendant is under no legal obligation. If the cause of the injury to the plaintiff may be as reasonably attributed to an act for which the defendant is not liable as to one for which he is liable, the plaintiff has not sustained the burden of fastening tortious conduct upon the defendant. The fact that a defendant joins issue upon a complaint containing a general averment of negligence, without moving to make the pleadings more definite, does not relieve the plaintiff from proving a particular act of negligence upon which to base his right to recover.' 38 Am. Jur. 975, Negligence, § 285." *Id.* at 831-2

De Young v. Campbell, 1957, 51 Wash. 2d 1111, 315 P. 2d 629, upon which appellant heavily relies, merely emphasizes the previously well recognized rule that inferences based upon circumstantial evidence may be sufficient to establish proximate cause: There "the evidence favorable to plaintiff, if believed by the jury *reasonably excluded the possibility* that the accident was the result *of any cause other* than [her tires] contact with the street car rail." (Emphasis added.) It was, as the court emphasized, "the only conclusion that could fairly and reasonably be drawn."

No such factual situation exists in this case. Many conclusions could fairly and reasonably be drawn from the evidence, including the conclusion that the wires attached to the tarp's eyelets had no proximate relationship whatsoever

to the accident and appellant's injuries. As the trial court stated herein below:

> "The testimony does not . . . rise to the quality and substance of the evidence before the . . . court in De Young v. Campbell [supra] the cited decision most favorable to plaintiff."

And see *Gardner v. Seymour*, 1947, 27 Wash. 2d 802, 150 P. 2d 564, particularly pp. 569 and 570.

Any award, by jury or court, would herein on the evidence before us, rest on speculation or conjecture. As the Washington Supreme Court said in *Nelson v. West Coast Dairy Co.*, 1940, 5 Wash. 2d 284, 105 P. 2d 76: "There must be more that a mere possibility that an accident or a jury may have occurred in a particular way." There must exist a reasonable probability the plaintiff's injuries were the proximate result of the defendant's negligence.

Here the appellant, an admitted expert on the proper way to place tarpaulins on loaded trailers placed piggyback on freight cars (flats or gondolas), working without instructions as to how or in what manner he was to place the tarp; facing a deadline and in a hurry to finish his work; moving as he was over an uneven surface to such place and position on top of the load as he desired; without proof of any defective condition in the freight car, trailer, binding chains, tarpaulin, wires, ropes or any other equipment; with no proof anything gave way, or caught, or was suddenly released, has only proved that 'something' gave way, including the appellant's grip on the tarpaulin.

This, of course, is not to say that appellants cannot win cases based on inferences arising from circumstantial evidence alone. They may, but as we have pointed out, the evidence must then "reasonably exclude" any other proximate cause. This the evidence here presented to the jury failed to do.

The order of the district court, dismissing the action notwithstanding the general verdict of the jury for the appellant, is *Affirmed*.

(Endorsed) Opinion Filed March 13, 1963.

Frank H. Schmid, Clerk.

UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT

DALE ROSS,
Appellant,
vs.
GREAT NORTHERN RAILWAY COMPANY,
Appellee.
No. 18,278

APPEAL from the United States District Court for the Eastern District of Washington, Northern Division.

THIS CAUSE came on to be heard on the Transcript of the Record from the United States District Court for the Eastern District of Washington, Northern Division and was duly submitted.

ON CONSIDERATION WHEREOF, It is now here ordered and adjudged by this Court, that the judgment of the said District Court in this Cause be, and hereby is affirmed.

Filed and entered March 13, 1963.

UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT

Excerpt from Proceedings of Friday, April 12, 1963.

Before: CHAMBERS, ORR & BARNES, Circuit Judges.

ORDER DENYING PETITION FOR REHEARING

On consideration thereof, and by direction of the Court, IT IS ORDERED that the petition of appellant filed April 8, 1963 and within time allowed therefor by rule of court, for a rehearing of above cause be, and hereby is denied.

APPENDIX C

(Record page 101)

(PORTIONS OF THE RECORD)

A. You have to put it on over the sides of the load.

Q. And after you get it over the sides, is it secured to the sides of the—

A. (Interposing) It is secured to the sides of the trailer.

Q. I see. Now, you started to unfold it, as I take it?

THE COURT: When you are finished with the demonstration, I think you had better come back to the stand.

MR. DEGLOW: Go back to the stand, please.

Q. (By Mr. Deglow) Mr. Ross, recollecting your testimony, did you move the tarp after you found that it was in the wrong direction, folded wrong?

A. We had to put it longways of the trailer, yes.

Q. I see. Now, did that involve unfolding the tarp and refolding it or anything of that nature?

A. No, we left it partially unfolded and proceeded to turn it partially unfolded.

Q. And did you turn that so t. t you could unfold it like you just demonstrated to us here?

A. We had to turn it so it would fold longways over the load, yes.

Q. Incidentally, did you see any foreign matter in the tarp that was not part of the tarp material?

A. Not at first, no.

Q. When did you first see any foreign matter, if you did?

(Record page 102)

A. Well, when we started to turn it, after we had turned it a ways, we started to unfold it some more.

Q. And what did you see?

A. The last thing I remember is wire.

Q. And where was this wire?

A. It was through the eyelets.

Q. Had you ever seen similar wire like that before on tarps?

A. I had never seen it on tarps, no.

Q. Had you ever seen it used by the Great Northern or the Spokane International Railways?

A. Not on tarps, no.

Q. Had you ever seen it in use by them is what I should have said?

A. Yes, it is around the freight house.

Q. Now—

THE COURT: What do you mean, wire of that kind is around the freight house?

THE WITNESS: Yes.

Q. (By Mr. Deglow) Have you seen that or similar wire on more than one occasion, Mr. Ross?

A. Yes.

Q. And was that used to your knowledge by the Great Northern and or the Spokane International?

A. I don't know too much about the Spokane International, no.

Q. Had you seen that used by the Great Northern?

(Record page 107)

Ross says he recalls this wire looked like. Your job will be on the whole evidence as you hear it, to see whether or not there is or is not any similarity or whether you think so from what you have heard thus far or hereafter. Keep in mind it is merely to illustrate what he says the wire looked like to him as best he knows at that time. Do you have that in mind, not to be confused as though it were the wire or that anything of the kind? Is that clear?

All right. With that admonition, it may be used

Q. (By Mr. Deglow) Maybe I should refresh your recollection. This wire that you saw on this particular tarp was only some four to six inches long, is that right, Mr. Ross?

A. What I can remember, yes.

Q. Would you pass that to him?

MR. DEGLOW: May the jury see that and feel that wire?

THE COURT: Yes, they may.

(Whereupon, the exhibit was passed to the jury.)

Q. (By Mr. Deglow) Prior to this time, had you ever seen any wire in any tarps furnished to you by the Great Northern for use in covering loads on their railway cars or piggy-backs or trailer?

A. I never noticed any wire.

Q. And this wire I take it you saw on some two of the eyelets?

(Record page 108)

A. I recall two, yes.

Q. O.K. Now—

THE COURT: Now, excuse me, do you mean you saw just two little pieces four to six inches on two of the eyelets?

THE WITNESS: Yes.

THE COURT: Do you know whether it was two or three?

THE WITNESS: I would say three, as much as was unfolded at that time.

Q. (By Mr. Deglow) You didn't have it completely unfolded at any time, to your knowledge?

A. No.

Q. What happened to you after you had given the way bill to Mr. McFarland and gotten up an started to unravel the tarp?

A. I got back up on the load, and at that time my brother,

Jerry, was there, he said. "We are going to have to turn the tarp. We are going to have to turn it."

Q. Did you turn it?

A. We were in the process. I stepped across the load to the south side at that time.

Q. And then what happened at that time?

A. I reached down, we were pulling and stretching or moving the tarp out, and I was over the side.

(Record page 109)

Q. Now, can you recall to the jury how this tarp felt as you were endeavoring to unfold it prior to the time that you went over the side?

THE COURT: When you say "went over the side," do you mean you fell off?

THE WITNESS: Yes.

Q. (By Mr. Deglow) Maybe I should clarify that. Is that that you went off this side rather than say the end of it?

A. Yes. I was off about the center.

Q. Off about the center of the load where the tarp was?

A. Yes.

Q. Going back to my question, would you describe from your recollection how that tarp felt up to the time you fell off this load?

A. Well, we were having a little trouble moving it, not too much, and as I was unfolding it and turning it, it seemed to give way and I went over the side.

Q. Now, Mr. Ross, about how many unfoldings of tarps had you done in covering of loads prior to the date that you had your injury on similar trailers?

A. Numerous times, a number of times.

Q. Had you ever had any difficulty in putting the tarp or unfolding them before like on this occasion? Did you have any similar difficulty before?

A. I never had too much trouble with tarps before.

(Record page 110)

Q. Incidentally, also, Mr. Ross, this last car here (indicating), is this called the gondola car?

A. That is called the gondola car.

Q. And the tarp that you were unfolding, has that got a name for it?

A. Well, we figured it previously had gone on a gondola.

Q. Do you mean this tarp had previously been on a gondola car?

A. Yes.

Q. Was that similar to the tarps that you previously used in covering loads for the Great Northern?

A. Well, they didn't have too many at that time. This was early, we just started moving aluminum for them on the flatcars or on the flatbed trailers.

Q. Did Riverside Warehouse ever furnish tarp to them for covering these loads?

A. Not that I know of.

Q. And this tarp then was a gondola tarp rather than the other type of tarp you had been using, is that correct?

A. Yes.

Q. Now, just briefly can you describe what the difference would be between the gondola tarp that you had on top or the other type of tarp that you had used before?

A. Well, they would be oversized.

MR. WETZEL: I will object unless he will base this on personal knowledge.

(Record page 111)

MR. DEGLOW: That is all we are asking.

THE COURT: Make that plain.

Q. (By Mr. Deglow) This is your knowledge, is it not?

A. This is my knowledge only.

Q. And it is on your feel of the tarps and your sight of the tarps?

A. Yes.

Q. Your carrying the tarps and your unloading the tarps?

A. Yes.

Q. You are not talking about someone else's—what somebody else told you, you are talking about what you saw and felt?

A. That is what I know, yes.

Q. Now, after you went off the side of the car, what happened?

THE COURT: Excuse me. This now turns to a new subject, doesn't it?

MR. DEGLOW: Yes.

THE COURT: I mean you have concluded about the business of his fall?

MR. DEGLOW: Yes, Your Honor.

THE COURT: This would be a good time for a subject break.

MR. DEGLOW: Fine.

THE COURT: We will have the morning recess, ladies and gentlemen.

(Record page 112)

(Whereupon, the jury withdrew from the courtroom.)

(Whereupon, a short recess was taken.)

THE COURT: All present.

MR. DEGLOW: Judge, in looking over my notes here, I have about two or three questions leading up to the fall. I would like to go back.

THE COURT: You may do that. Go ahead.

Q. (By Mr. Deglow) Mr. Ross, prior to the time before the time you fell off and talking about unraveling or unfolding the tarp—

A. Yes.

Q. Do you remember that?

A. Yes.

Q. Now, would you just describe in your own words your reasoning and your opinion as to how you happened to go off this load of aluminum respecting the tarp?

MR. WETZEL: Objection, Your Honor. That has been asked and answered.

MR. DEGLOW: I don't think it has.

THE COURT: He may again state the matter. Go ahead.

MR. HAMBLEN: May I join in the objection, Your Honor. He has asked him for his reasoning and his opinion.

THE COURT: Well, there may be something to that.

(Record page 113)

Rephrase the question, please.

Q. (By Mr. Deglow) Tell us how you happened to lose your grip on the tarp and fall off the load.

THE COURT: Let me put it this way, just tell us again, Mr. Ross, what you did at the time and what happened to you.

A. Well, as I was moving the tarp and unfolding it, I ran into trouble, or it was holding up, and I braced myself to keep the tarp moving and unfolding, and something gave way. And I stepped back, I slipped, my hand slipped, I was over the side. I catapulted to the ground. I did not touch the side of the car.

Q. Now, was this load of aluminum there stepped down in size like steps of a ladder?

A. I believe it was, yes.

Q. By steps, I mean if you're looking at it longways, say, looking at it this way on this load (indicating), the aluminum was there sort of little protrusions of the skids or aluminum in the form of steps?

A. Yes.

Q. About how far did they stick out from, say, level line of the load, if you can recollect?

A. What I can recollect, the bottom of the load covered the bottom of the trailer which is eight feet.

Q. I see. Now, Mr. Ross, you fell down to the concrete. I

(Record page 114)

take it?

A. Yes.

Q. What part of your body hit on that concrete first, what was the first part, if you know, that hit the concrete?

A. Well, on the bottom, right across the bottom of the back.

Q. Any other parts of your body hit there?

A. Then I was flung back and my head hit it, I was thrown back, whiplash, I believe is what they call it.

Q. How did you feel?

A. I didn't feel anything.

Q. I see. Were you in any physical pain at that time?

A. I was just numb.

Q. What happened?

A. I believe I tried to get up, yes.

Q. Were you able to get up?

A. I tried to. I don't think I made it, no.

Q. Did you—

A. (Interposing) The first I can remember I was trying to get up.

Q. I see. Did you stay there at that spot?

A. I am sure I stayed in that spot.

Q. Later on did an ambulance come and pick you up and take you some place?

A. I believe I was picked up by an ambulance.

Q. Were you taken up to the St. Luke's Hospital in Spokane?

(Record page 115)

A. Yes.

Q. Now, how were you put aboard this ambulance? Did you walk aboard there?

A. No, I was put on a stretcher. I am sure, I mean—

Q. O.K. What happened to the load, if you know?

A. Well, I can recall one or two things. I said, "Let's finish tarping the load" is all when I was there on the ground.

Q. Then, you went to the hospital, did you not?

A. Yes.

Q. And do you know where they took you and what they did to you in there? Just briefly describe where you were and what happened to you from the time you got there?

A. Well, that is pretty vague.

Q. Tell us what you can recall.

A. I can recall them trying to take my clothes off, parts of it. I mean, I had a leather jacket on and I don't know how they got them off, no.

Q. Do you remember them taking you into this X-ray room?

A. I can remember part of it.

Q. Do you remember talking to your wife?

A. She was there.

Q. Do you remember talking to her?

A. Yes.

Q. Did you talk to Mr. Wellman this evening?

(Record page 116)

A. I can't remember that, no.

Q. Do you remember talking to anybody besides your wife and the doctors or the people working on you in the hospital?

A. I believe I was talking to the doctor. I don't know what the conversation was, it was vague.

Q. Do you remember being in pain or being free from pain during this period of time in this first evening?

A. No.

Q. Where did you hurt?

A. Well, I had a terrific headache and—

Q. Any particular parts of your body give you discomfort?

A. Well, I was having trouble with my legs. I had to keep moving. I don't know why. I think I remember that.

Q. What do you mean you had to keep your legs moving?

A. Well, I don't know. I was just more or less thrashing back and forth.

Q. Were you standing and walking when you did that?

A. No.

Q. Where were you?

A. I was in bed.

Q. I see. Now, do you know whether or not you were given medication and treatment there by the doctor?

A. I couldn't tell you that, no.

Q. Now, the next day—incidentally, how long were you in the hospital before you went home?

(Record page 284)

Q. Incidentally, to your knowledge, is there an interstate commerce requirement that your drivers of trucks on loads like this comply and take a physical examination with respect of vision every 36 months?

A. Yes, there is.

Q. And if a driver fails to pass the vision requirements as prescribed by the Interstate Commerce Commission, will he be allowed by you to drive a truck of material in interstate commerce?

A. No, he wouldn't be permitted to. We are under their regulations.

Q. I see. And this would be of those movements that would be governed as to whether or not he complied with the Interstate Commerce Commission requirements?

A. Yes, it would.

Q. At any time, to your knowledge, had Mr. Ross ever failed in any eye examination for driving?

A. Not to my knowledge, no.

Q. Prior to March 19, 1959, had he made any complaints to you whatsoever about his inability to see in driving or performing those duties?

A. No, he hadn't.

Q. Now, prior to March 19, 1959, had you made a twenty-five year safety award to Dale Ross?

A. Prior to 1959?

(Record page 285)

Q. Yes.

A. He has a long safety record. I think that award was made here this present year.

Q. For services prior to 1959 and on?

A. Yes.

Q. Now, you weren't out there at the scene when he was injured, were you?

A. No, I wasn't.

Q. When did you first hear about it and where were you?

A. I was home at the time and I don't recall the exact time of the evening, it was in the evening. I was called by Mr. Ficka who is our operating superintendent.

Q. Would you say that would be, say, from five to six o'clock you would have been home or maybe a little later?

A. I generally don't get home until after six.

Q. Now, did you—

A. (Interposing) Probably a little later.

Q. Did you go down to the hospital?

A. Yes, I did.

Q. Did you see Mr. Emmett Ross there?

A. I don't recall seeing him, no.

Q. Do you recall seeing Mrs. Ross there?

A. Yes, I did.

Q. Incidentally, what time did you get there?

A. I don't recall exactly. I know I waited, he was not in

(Record page 380)

fifth wheel?

A. Yes, you could say that.

Q. And calling your attention to the train and the mock-up here, this is where you were (indicating)?

A. That is right.

Q. Down under here.

THE COURT: You are pointing now underneath the truck bed, I mean the bed of the flat?

Q. (By Mr. Kimer) Pointing under the bed.

A. With the absence of the tractor.

Q. Tractor is out and then there is the fifth wheel that you put down here?

A. Yes.

Q. Am I understanding you were down here and Dale and his brother on top of the load?

A. That's right.

Q. Prior to his fall?

A. Yes.

Q. Now, Mr. Griffin, did you observe any wire in this tarp before Mr. Ross fell?

A. Prior to his fall, no.

Q. Did you observe any wire in the tarp after he fell?

A. Yes.

Q. What kind of wire was it?

A. Well, it was heavy binding wire.

(Record page 381)

Q. Would it be similar to this wire, Mr. Griffin (indicating)?

A. It could have very easily been.

Q. Heavy wire?

A. Heavy wire, yes.

Q. Were these wires in the eyelets of the tarp?

A. Yes.

Q. Showing you this for illustration, similar to that only larger, of course?

A. Yes.

Q. And were these short pieces of wire, long pieces of wire?

MR. WETZEL: I object to the leading form of the question.

THE COURT: What kind of wire was it?

THE WITNESS: Fairly short.

Q. (By Mr. Kimer) State whether or not the wire was bent or straight?

A. Well, it was in pieces.

Q. Different lengths?

A. I believe they were, yes.

Q. And do you know whether or not they were sharp on the end?

A. Yes, I believe you would say they were sharp.

Q. Do you know why they were sharp?

A. I presume because they were cut off when the tarp was removed.

Q. You observed these in the tarp after Mr. Ross had fell?

(Record page 382)

MR. WETZEL: Objection.

THE COURT: Don't lead, please, counsel.

Q. (By Mr. Kimer) State whether or not you observed these in the tarp after Mr. Ross fell.

A. Yes.

Q. Now, state whether or not the train was waiting there for the load.

A. The train arrived shortly after the accident, as I recall it.

Q. And can you state why, if you know, there were three of you working on this particular load?

A. Well, the time was growing short and I was assigned as an extra man to expedite the shipment, speed it up a little bit.

Q. Now, state whether or not this was a large tarp or a small one.

A. It was an adequate tarp to cover the load.

Q. Incidentally, do you know from your own knowledge, Mr. Griffin, whether or not the Ross Transfer owns large tarps or small tarps?

A. They have a dozen tarps of various sizes; they have large ones and small ones.

Q. Did you work with Mr. Ross--do you work with Mr. Ross now?

A. No.

(Record page 401)

Q. (By Mr. Deglow) Before he fell, Mr. Ross, I am referring to your brother now, when you were up on the load, what you saw with your eyes, describe everything that you saw that was visible to you respecting this tarp, and I am talking about the tarp now?

A. I don't remember seeing wires then. We had the tarp fairly out. I wasn't concerned with what was in it. I saw that it was folded. We had it folded out.

Q. Now, are you through?

A. Yes.

Q. After your brother was down on the concrete and after you got up, did you complete any work respecting tarping this?

A Yes.

Q. Would you describe to the jury in relation to the tarp what you saw during the progress of your work up to the time that you completed tarping this load?

A. I don't remember tarping the load but I remember the wires. I don't remember anything.

Q. Where did you see them and what did they look like?

A. I just know I saw the wires there but I don't remember —we may have used the wires to tie the load down but I don't remember. I don't remember tarping it.

Q. How many did you see?

A. I don't remember.

Q. Showing you from here Exhibit No. 10, would you state

(Record page 402)

whether or not you saw that or similar wire pieces on this tarp load?

A. I saw similar wire.

Q. All right.

MR. DEGLOW: That is all

THE COURT: Cross-examine, please.

CROSS-EXAMINATION

BY MR. WETZEL:

Q. On the day of the accident, you were employed by Ross Transfer the same as your brother, Dale, is that true?

A. Yes, sir.

Q. And you were also a truck driver?

A. Yes, sir.

Q. And you were working on piggy-back?

A. Yes.

Q. And Dale was in charge of piggy-back, was he not?

A. He was in charge. Right at that moment, I would say he was in charge.

Q. Now, just to refresh your recollection, at the time of this accident, you were helping Dale and Tom Griffin tie down the load?

A. Yes.

Q. Now, was Tom Griffin securing the trailer to the flat-car?

A. Yes.

(Record page 417)

A. I don't recall or no—no, I didn't say that.

Q. Well, when Mr. Gerkensmeyer was there, did you discuss how you thought this injury to you had happened and how you went off this load?

A. No. We did not discuss it.

Q. About how long was he there?

A. I would say fifteen, twenty minutes.

MR. DEGLOW: That is all.

THE COURT: Cross.

MR. KELLEY: I missed it, your Honor. I apologize. By "there"—

THE COURT: At the house, I assume he means, fifteen, twenty minutes.

MR. DEGLOW: That is right, at the house.

CROSS-EXAMINATION

BY MR. WETZEL:

Q. Mr. Ross, you don't recall what Mr. Gerkensmeyer said this morning?

A. I recall.

Q. Pardon?

A. I recall what he said.

Q. I thought you said you didn't recall?

A. I said I recalled what he had said. I know what he said, yes.

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Respondent.

RESPONDENT'S BRIEF IN OPPOSITION TO PETITION FOR CERTIORARI

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STATEMENT OF THE CASE

Plaintiff was injured when he fell from a trailer load of aluminum on flat car while attempting to cover the trailer with a tarpaulin.

For its statement of the case, respondent, Great Northern Railway Company, adopts the statement of facts in the opinion issued by the Ninth Circuit Court of Appeals on March 13, 1963 (Petitioner's Brief, Appendix B, pp. 34 through 46).

QUESTION PRESENTED

The question presented here is the simple factual and legal question, as follows:

> Where under applicable State law a U. S. District Court finds that the evidence favorable to the plaintiff does not rise to the quality and substance of evidence required to prove that negligence of the defendant

proximately caused the injury and that the evidence for plaintiff is based on conjecture and speculation, does such Court have the authority to set aside a verdict for plaintiff?

The Circuit Court and the District Court Searched the Record and Could Find No Proof of Negligence or Proximate Cause on Which to Base a Verdict. Petitioner Attempts to Do So by Distorting the Record.

The evidence most favorable to petitioner and, in fact, the only direct evidence describing the fall and purporting to establish the proximate cause, is the following entire testimony of plaintiff on that subject:

"Q. What happened to you after you had given the way bill to Mr. McFarland and gotten up and started to unravel the tarp?

"A. I got back up on the load, and at that time my brother, Jerry, was there, he said, 'We are going to have to turn the tarp. We are going to have to turn it.'

"Q. Did you turn it?

"A. We were in the process. I stepped across the load to the south side at that time.

"Q. And then what happened at that time?

"A. I reached down, we were pulling and stretching or moving the tarp out, and I was over the side." (R. 108)

"Q. Going back to my question, would you describe from your recollection how that tarp felt up to the time you fell off this load?

"A. Well, we were having a little trouble moving it not too much, and as I was unfolding it and turning it, it seemed to give way and I went over the side." (R. 109)

"THE COURT: Let me put it this way, just tell us

again, Mr. Ross, what you did at the time and what happened to you.

"A. Well, as I was moving the tarp and unfolding it, I ran into trouble, or it was holding up, and I braced myself to keep the tarp moving and unfolding, and something gave way. And I stepped back, I slipped, my hand slipped, I was over the side. I catapulated to the ground. I did not touch the side of the car." (R. 113) (Trial Court's Memorandum Decision R. 39-40.)

From the above testimony of plaintiff and the testimony most favorable to plaintiff, he distorts the record and comes up with assertions such as the following:

"... the tarpaulin containing foreign sharp wires extending through eyelets of the tarpaulin, which hung up the tarpaulin and caused it to resist unfolding by petitioner, the wires suddenly releasing the fold of the tarpaulin so as to cause the petitioner to be catapulted off of the top of the load, ..." (Petitioner's Brief, p. 3.)

The quotation above is one of many examples of an overzealous attempt of petitioner to bend the facts to fit the law. Nowhere in the record is there evidence or testimony of the folds of the tarpaulin becoming hung up. Nowhere is there evidence or testimony of "wires suddenly releasing the fold of the tarpaulin."

Again, at page 7 of Petitioner's Brief, he says:

"Also, the defendant offering no explanation of the hanging up and sudden release of the tarpaulin, ..."

Nowhere in the record did anyone testify to the "... sudden release of the tarpaulin." This is an outright distortion of the evidence by petitioner to suit his purposes and theory.

Further misstatement of the record appears again at page 11 of Petitioner's Brief, as follows:

> "As the Plaintiff was unfolding the tarp he ran into trouble. It *hung up its folds* [emphasis supplied], it refused to unfold, the plaintiff applied more force. The resistance inside the tarp, suddenly and unexpectedly released the fold and the Plaintiff was thrown off the load."

In the quotation above, petitioner has again invented facts in finding that the tarp "hung up its folds." Nowhere does the record or any testimony refer to refusal on the part of the tarpaulin to unfold. Nowhere does the record or the plaintiff show an application of more force. The record is devoid of any testimony regarding resistance inside of the tarp suddenly and unexpectedly releasing the fold or doing any other act. Petitioner next refers to his being *thrown* off the load. This statement seems to infer some outside force when, as a matter of fact, the only energy and force involved here is the human physical force applied by plaintiff himself.

As the circuit court pointed out on the 9th page of its Opinion (Petitioner's Brief, Appendix B, p. 43):

> "The difficulty with appellant's factual position on appeal is that he interprets the language: 'a slip—my hand slipped,—something gave way' into a 'sudden release of *the wires*—the only items that could cause the tarp to suddenly release.' The story told by appellant best suited to his counsel's theory of the case does not support the language used on his behalf in his briefs. It assumes the slip of appellant's hand, the bracing pull appellant made; his moving from the center of the load to the south side, facing north, and his uneven footing all *could not* have caused or proximately contributed to the occurrence

> of the accident. This without reference to appellant's deadline, his admitted haste, his alleged admitted loss of balance."

As the circuit court points out above, petitioner, in asserting that the District Court and Court of Appeals "misinterpreted the testimony," makes factual claims that are not supported by the record. The petitioner, in his brief now before this Court, has made the same factual misstatements.

At page 14 of Petitioner's Brief, he says:

> "As the testimony showed, and found by the jury, the something gave way first, which they found to be the wire, and then he slipped—his hand slipped due to the sudden release of the force within the folds of the tarpaulin."

In referring to the wires, the circuit court, in its Opinion (Petitioner's Brief, p. 43), has the following to say:

> "The jury's interrogatories did not explicitly cover or refer to wires, nor what caused the fall, nor were any such interrogatories requested or proposed."

In short, there was no such finding by the jury as alleged by petitioner, nor was there any sudden release of force within the folds because there was no force exerted between the folds of the tarpaulin.

Petitioner, at page 21 of his Brief, says:

> "... defendant never presented any hypothesis or evidence that the tarpaulin which the plaintiff was unfolding *would catch up and suddenly release with a spring-like force from any other cause*, except by the wire or wires *hanging up the inner folds of the tarpaulin*." [Emphasis supplied]

The quote above is simply another variation on petitioner's distortion and misstatement of the record. The evidence contains nothing regarding any "catching up" or "sudden release" or "spring-like force" or "wires hanging up the inner folds of the tarpaulin."

Continuing at page 21 of Petitioner's Brief, he says:

> "When the Plaintiff testified that 'something gave way . . .' (R-113) he was not referring to any part of his body, but something at that point that was invisible to him within the folds of the tarpaulin. As the force released the wires the fold straightened out and as his catapulting fall was initiated the last thing the Plaintiff saw was the wire . . . which now had come into view; but too late for the plaintiff to save himself from being violently ejected from the load."

While it is true that the portion of the record cited in the last quoted portion of the petition supports the statement that the last thing plaintiff saw was the wire, nothing in the portion of the record cited, nor elsewhere for that matter, supports or raises any inference that a "force released the wires" or that the force of the wires or any other force "violently ejected [plaintiff] from the load," or that the canvas did "suddenly release with a spring-like force."

While petitioner refers to the lower court's summing up of the evidence as ". . . a recapitulation of contradicted evidence and imagination of defense counsel and the district court. . . ." (Petitioner's Brief, p. 22), the fact remains that petitioner has not pointed to any testimony favorable to petitioner *in the record*, which was overlooked by either the district court or the circuit court. Evidence sufficient to sustain a verdict for petitioner was not and

is not in the record.

Petitioner here asserts for the first time that, "No motion for directed verdict or dismissal was made" (Petitioner's Brief, pp. 6 and 12). While respondent fails to see the significance of petitioner's claim raised here before this Court for the first time, as a matter of record this respondent, as well as other defendants, made motions to dismiss at the close of plaintiff's case. The trial court considered and denied the motions and allowed exception and reserved the motions for further consideration (R. 423, 424). Respondent requested a directed verdict by a proposed instruction submitted to the court at close of the entire case.

The District Court and the Circuit Court of Appeals Properly Gave Effect to Washington State Law Without Violation of Any of Petitioner's Rights.

When the jury by answer to special verdict on interrogatories, found that plaintiff was not an employee of any railway company (R. 36), counsel agreed that the case then became one based on Washington common law. The trial court so found in the first paragraph of his Memorandum Decision (R. 39).

The federal district court and the circuit court properly gave effect to Washington State law as required by the Rules of Decision Act (28 U.S.C. §1652), and the decisions of this Court. *Erie R. Co. v. Tompkins*, 304 U. S. 64, 82 L. ed. 1188 (1937).

The applicable Washington rules of law applied by the district and circuit courts were as follows:

1. *Substantial* evidence of defendant's negligence and the

proximate causal relationship between it and a plaintiff's injuries must be proven by plaintiff. A scintilla of evidence is insufficient under Washington law. *Wilson v. Northern Pac. R. Co.*, 44 Wn.(2d) 122, 265 P.(2d) 815 (1954); *Evans v. Yakima Valley Transp. Co.*, 39 Wn.(2d) 841, 239 P.(2d) 336 (1952); *Carley v. Allen*, 31 Wn.(2d) 730, 198 P.(2d) 827 (1948).

2. If the case presents two or more conjectural theories under one or more of which the defendant would be liable, and under one or more of which the plaintiff will not be entitled to recover, the jury will not be permitted to conjecture how the accident occurred. *Gardner v. Seymour*, 27 Wn.(2d) 802, 180 P.(2d) 564 (1947).

3. If the injury might have resulted from one of several causes, the plaintiff must produce evidence which will exclude the operation of those causes for which defendant would not be liable. 38 *Am. Jur.* 975, Negligence, §285; *DeYoung v. Campbell*, 51 Wn.(2d) 11, 315 P.(2d) 629 (1957).

4. There must be more than a mere possibility that an accident may have occurred in a particular way. *Nelson v. West Coast Dairy Co.*, 5 Wn.(2d) 284, 105 P.(2d) 76 (1940).

Following the above Washington law, the district court had no alternative but to dismiss the case, notwithstanding the verdict of the jury.

While petitioner complains vaguely of a violation of the Seventh Amendment by reason of the court granting judgment n.o.v., he does not answer or explain the plain, simple rule of law that a verdict in favor of plaintiff must

be set aside when there is not sufficient evidence to sustain the verdict. In such a case, as here, there is no element of discretion involved in ruling upon this issue. *Flannery v. Nelson*, 59 Wn.(2d) 120, 366 P.(2d) 329 (1961).

CONCLUSION

There has been no violation of any federal statute or the Constitution, nor has there been any departure from accepted judicial proceedings here. Petitioner has presented no reason under Rule 19 of Supreme Court Rules, or otherwise, for granting certiorari. The federal district court in the *instant* case had a mandatory duty to grant the motion for judgment n.o.v. and dismiss plaintiff's case on evidence which was insufficient under applicable law to support a jury verdict. For the foregoing reasons petition for writ of certiorari should be denied.

Respectfully submitted,

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REPLY BRIEF FOR PETITIONER

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REPLY BRIEF FOR PETITIONER

The respondent's brief in opposition does not meet the petition. In the main it merely urges contentions made in the courts below.

After reading respondent's brief one might well ask: "In whose favor was the verdict in the trial Court? For respondent's argument would be valid only if the verdict were for the defendant.

The jury after reviewing all the evidence returned a verdict for the Plaintiff.

RESPONDENT'S POSITION IS NOT SUPPORTED BY THE RECORD

1. The Petitioner has not misstated the record in this case. Petitioner printed pertinent portions of the record which substantiated the verdict of the jury. In addition, the Petitioner DEMONSTRATED the placement and movement, folding, and unfolding, of the tarpaulin on the top of the trailer (R. 96-101).

2. Respondent does not attempt to negative Petitioner's assertion that the courts below in deciding questions of law, ignored the clear rule of this Court that the reviewing Court must assume as established all facts in support of Plaintiff's claim that the evidence reasonably tends to prove and all favorable inferences flowing from such evidence.

3. Respondent does not attempt to show evidence supporting other possible causes of the Petitioner's catapulting fall. The personal attack upon the Petitioner's counsel by the respondent ignores their absence of proof at the trial to support any of the lower courts' rulings. They fail to recognize, discuss or controvert the circumstantial evidence of this case surrounding the occurrence which justified reasonable jurors in concluding that the thing charged was the prime and moving cause of the Plaintiff's injuries. Respondent, at page 3 of their brief declare that there was no evidence or testimony OF THE FOLDS OF THE TARPAULIN BECOMING HUNG UP. Yet, at the top of page 3 of their brief they point out direct testimony of the Plaintiff as follows:

"A. Well, as I was moving the tarp and unfolding it, I ran into trouble, or it was *holding up*, . . ."

4. The evidence of the Plaintiff, the circumstantial evidence and inferences flowing from it all could be considered by the jury in the light of the instructions of the court when he narrowed the issue by instructing the jury as follows: "That the sole and only basis upon which it is asserted that this defendant was negligent was the evidence concerning whether or not there was or was not wires in one or more of the eyelets of the tarpaulin; that the jury must not discuss or consider or speculate or conjecture about anything else than that" (R 461-462) (Our petition p. 11-12). " . . . Does the evidence show, can you find from this evidence that if there were wires in the tarpulin where they were located, what, if anything, did they have to do as far as the evidence discloses with this accident?" (R 461-462). (Our petition p. 11-12).

5. The jury complied with these instructions; they found the sharp wires in the eyelets, supported by the record (R 102) (Our petition Appendix C-p. 48-49) (R 380-382) (R 401) (Our petition Appendix C-p. 59-61). When the Plaintiff Ross testified he was "catapulted" to the ground "I did not touch the side of the car" (R 113). Our petition Appendix C-p. 54) the jury found from the circumstantial evidence and the reasonable inferences flowing therefrom that an agency within the tarpaulin caused him to be thrown off. This was corroborated by witness Griffin as follows: (R 383)

Q. Do you know whether or not he fell clear of the load or was it kind of a sliding fall?

A. I have the impression that he fell quite clear of the load, because I immediately jumped down and he was away from the side of the car.

Q. There was, as I understand it, no sliding down the load, ricocheting?

A. No.

6. The reasons advanced by the circuit court's finding of contributory negligence in support of the respondent railroad's theme is based on testimony that at best merely conflicts in favor of defendant railroad. In passing on the correctness of this theory, the courts below, could not in conformity with the rule established by this court, even consider, much less accept such testimony-evidence, if any, for respondent as against the conflicting testimony for Plaintiff Ross. The jury passed on such conflicts and found by a specific interrogatory propounded by the court that Plaintiff was NOT CONTRIBUTORILY NEGLIGENT (R 462-463).

7. The *Frescoln vs. Puget Sound Traction*, L. S. P. Co. case of 90 Wash. 59, 155, p. 395, and *St. Germain vs. Potlatch Lumber Co.*, 76 Wash. 182, 135 Pac. 804, are the ruling decisional law in Washington on circumstantial evidence cases similar to this cause. Respondent does not controvert these rules.

The Petitioner has printed the applicable portions of the record in Appendix C (Petitioner's Brief, pages 48-64) for this Court's consideration. In addition, the Petitioner at the District Court trial DEMONSTRATED physically to the jury the mechanics of folding and unfolding the tarp (R 96-101). (Petitioner's Brief, page 48).

Respondent does not purport to point out all of the evidence surrounding the fall, but highlights segments it believes supports its view of the evidence.

Respondent urges that it requested a directed verdict instruction. Respondent neglects to point out to this court, that this requested charge was not given by the trial court, further that respondent did not except to the court's failure to give this instruction (R 494-495).

CONCLUSION

The record remains clear that the lower courts failed even to recognize the applicable law and proceeded to retry the facts in derogation of Petitioner's right to a jury trial and in violation of the Seventh Amendment to the Constitution of the United States. It failed even to consider the facts adduced in support of Petitioner's claim and instead tested the verdict solely by reference to an interpretation in favor of respondent of what was, at best, merely conflicting evidence for respondent. Its failure to consider Washington decisions is also manifest.

Most significantly, respondent in this Court attempts to show by argument only, the courts below did follow the correct rule of law in exercising their review function. Respondent clings tenaciously to its own interpretation of evidence most favorable to it as the premise for the arguments here advanced, which were rejected by the jury which considered all the evidence.

Since these undefended errors of the courts below clearly

violate Petitioner's right to jury trial as well as the Rules of Decision Act, it is submitted that there is clearly presented appropriate occasion for the exercise of this Court's certiorari jurisdiction.

Respectfully submitted.

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